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No. 552

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, *Appellant*,

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, JOHN M. HANCOCK, ET AL.

Appeal from the United States District Court for the Southern District of California.

STATEMENT AS TO JURISDICTION

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 73-296

UNITED STATES OF AMERICA, *Plaintiff*,

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK, *Defendants*.

Civ. 73-297

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPRATED, and JOHN M. HANCOCK, *Defendants*.

Civ. 73-298

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE KROGER COMPANY, JEWELL TEA COMPANY, INC., and JOHN M. HANCOCK, *Defendants*.

(Filed Oct. 27, 1952, U. S. District Court, S. D. of N. Y.)

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement

particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgments of the district court entered in these causes on August 29, 1952. A petition for appeal is presented to the district court herewith, on October —, 1952.

OPINION BELOW

The memorandum of the district court has not been reported. A copy of it is attached hereto as Appendix A.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgments entered in these causes is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgments on direct appeal in these causes:

United Shoe Machinery Corporation v. *United States*, 258 U. S. 451

International Business Machines Corp. v. *United States*, 298 U. S. 131.

QUESTION PRESENTED

The United States brought three separate actions under Section 8 of the Clayton Act alleging that interlocking directorships held by the same

individual in each of three sets of two competing corporations were illegal. The complaints named both the individuals and the companies as defendants. The Government sought broad relief, including an injunction against the individual defendant serving as a common director of any two or more competing companies, and against the corporate defendants having any director who was also a director of a competing company. After the suits had been filed, the individual resigned as a director of one of the two competing companies involved in each case, and stated that he had "no intention" of resuming his directorships with those companies. All the defendants then moved to dismiss the cases as moot. The district court granted the motions and entered orders of dismissal. The question presented is whether the cases were rendered moot by the director's resigning from one of the two competing companies after suit had been filed.

STATUTE INVOLVED

The pertinent provisions of Sections 8 and 15 of the Act of October 15, 1914, 38 Stat. 730, as amended, 15 U.S.C. 12 *et seq.*, commonly known as the Clayton Act, are as follows:

> Sec. 8. * * * no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in com-

merce * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. * * *

Sec. 15. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States * * * to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. * * *

STATEMENT

On February 27, 1952, three suits were filed by the United States under Section 15 of the Clayton Act alleging that the interlocking directorships held by John M. Hancock in (1) W. T. Grant Company and S. H. Kress & Company, (2) The Kroger Company and Jewel Tea Company, Inc., and (3) Sears, Roebuck & Company and Bond Stores, Incorporated, respectively, were in violation of Section 8 of that Act. Each of the complaints[1]

[1] The complaints in cases were substantially identical. A copy of the complaint in the *Grant* case is attached hereto as Exhibit B.

alleged that, for many years, Hancock had been a director at the same time of the two companies (Par. 13), and each company had permitted him to be elected and to serve as a director (Pars. 14, 15). The complaint further alleged that each of the companies had capital, surplus and undivided profits aggregating more than $1,000,000 (Pars. 2, 3), and that the two companies, by virtue of their business and location of operation, had been and were competitors so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws (Par. 12).

The relief sought in the complaint was that, *inter alia,* Hancock be ordered to resign his directorship in one of the competing companies "or both, as the Court shall direct" (Par. 2); that he be enjoined from serving as a director in any two or more competing companies, any one of whose capital, surplus and undivided profits aggregated more than $1,000,000 (Par. 3); that the company or companies from which Hancock is ordered to resign be enjoined from permitting him to be elected or to serve as a director in the future (Par. 4); and that both companies be enjoined from permitting any person to be elected or to serve as a director if such person "is at the same time a director of a competitor corporation engaged in interstate commerce." (Par. 5).[2]

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[2] The complaint also requested an adjudication that the defendants had violated Section 8 of the Clayton Act.

Shortly after the suits had been filed, Hancock announced that he would not stand for reelection as a director of Kroger, and resigned as a director of Kress and Bond. All of the defendants then moved to dismiss the complaints because, *inter alia*, the cases were moot. In an affidavit filed in support of the motions to dismiss, Hancock stated that he had terminated his relationship with each of the three companies "not because I believed that Section 8 of the Clayton Act was applicable, but because I did not believe I was justified in involving these two companies in the trouble and expense which would be required by a test of the action." Hancock further stated in his affidavit that he had "no intention of ever going back" on the boards of any of the three companies from which he had resigned.

The district court (Judge Conger), treating the motions to dismiss as motions for summary judgment, granted the motions and entered orders of dismissal. In an accompanying memorandum the court stated that "I do not think there is the slightest threat that the defendants will attempt any future activity in violation of Section 8 (if they have violated it already)."[3] The court also

[3] The court stated that he was following the decision in *United States* v. *Mather* (unreported, N. D. Ohio, 1935). In that case Judge Jones had dismissed as moot an action under Section 8 of the Clayton Act where the directors had resigned from one of the two competing companies after the Government had filed suit.

stated that he "fail[ed] to see what right the plaintiff has to a direction that Hancock resign from all the companies."

THE QUESTION IS SUBSTANTIAL

We submit that the effect of the decision below is to deny the Government effective relief in a proceeding under Section 8 of the Clayton Act. If a director holding interlocking directorships in competing companies can procure dismissal of the case as moot after suit has been filed by resigning all but one of such directorships and announcing his "intention" not to resume them, the Government's endeavors to enforce that section will be seriously handicapped.

The enforcement provisions of the Sherman Act (Section 4) and the Clayton Act (Section 15) use identical language in defining the court's injunctive powers. Both vest the district court with plenary power to "prevent and restrain violations" of the Act. Both also authorize the Government to request in its prayer for relief that violations of the respective Acts "shall be enjoined or otherwise prohibited." This broad grant of authority not only empowers but imposes an affirmative "duty" on the district court to grant relief adequate to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88. The court does not fulfill that

duty if it is "merely to end specific illegal practices." *International Salt Co.* v. *United States*, 332 U. S. 392, 401.

The Government in the instant cases did not limit its requested relief to removal of Hancock from the boards of one of the two competing companies. On the contrary, the Government sought a much broader remedial decree. It specifically asked the court that Hancock be enjoined from returning to the boards from which he was removed, and from serving as a director on any two or more competing corporations with a stated capital. In addition, the Government sought an order prohibiting each of the competing companies from permitting any person to serve as a director if such person "is at the same time a director of a competitor corporation engaged in interstate commerce."

The district court would have the power to enter such a decree if necessary to provide effective relief in this case.[4] "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past * * * when one has been found to have committed acts in violation of a law he may be restrained

[4] The district court would also appear to have the power to order Hancock to resign from both companies if the circumstances of the particular case rendered such an order appropriate. Cf. *Porter* v. *Warner Holding Co.*, 328 U. S. 395.

from committing other related unlawful acts". *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435, 436. Whether such relief is necessary, however, is a question that the district court can determine only after it has heard all the evidence relating to the illegal practices and the likelihood of their repetition. In the instant case the district court denied the Government an opportunity to present such evidence. Instead, the court dismissed the case as moot on the basis of the termination of the illegal practices and the director's statement that he had "no intention" of repeating the specific narrow violations upon which the suits had been based.

We submit that the court below erred in so doing. The case was not mooted either by Hancock's resignations or by his disclaimer of intention to resume the abandoned directorships. It is well settled that the mere discontinuance of the illegal practices after the Government has filed to enjoin them does not of itself moot the case. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 258; *Hecht Co.* v. *Bowles*, 321 U. S. 321; *Walling* v. *Helmerich & Payne*, 323 U. S. 37. "To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated." *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (C.A. 2). Surely the mere disclaimer of in-

tention to repeat the specific violations charged, does not satisfy this requirement.

Hancock, who has held interlocking directorships in at least three sets of companies for a number of years, made no specific commitment not to serve on the boards of other competing companies.[5] He did not even state unequivocally that he would not return to the three boards from which he had resigned, but merely that he had "no intention" of so doing. And he continued to assert the legality of the terminated relationships.[6] Cf. *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43. Nor was there anything before the court from which it could infer that there was no need for corrective injunctive relief against future violations by the defendant companies.

Under these circumstances, we believe that the Government was entitled to an opportunity to present to the court all the facts bearing on the need for the broad relief requested in the complaint. In refusing to accord the Government such an opportunity the district court erred. It is immaterial in this connection whether the court's decision is viewed as a holding that the case was moot as a

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[5] Poor's 1952 Register of Directors and Executives, p. 2191, lists Hancock as a director of 14 companies in addition to the six involved in this case.

[6] The district court noted that "Hancock has known of the Government's objections for the past five years or so and he has been discussing it from time to time with the Government."

matter of law; or a determination as a matter of discretion that there was "no reasonable expectation that the wrong will be repeated." *United States* v. *Aluminum Co. of America, supra.* The latter decision would appear to constitute an abuse of discretion. In any event, we think it clear that upon a finding of violation by the court, the Government would have been entitled to something more than an order merely enjoining Hancock from going back on the boards from which he resigned. "[R]elief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 90.

This is the first case under Section 8 of the Clayton Act brought before this Court in the 38 years that the statute has been in effect. Whether an interlocking director can preclude the Government from obtaining—or even showing the need for—broad injunctive relief by resigning after suit has been brought presents a significant question whose determination by this Court is important both in the administration of the Act and in its impact on the corporate and financial community.

For the foregoing reasons, we believe that the question presented by this appeal is substantial and is of public importance.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General

OCTOBER 1952

APPENDIX "A"

#20058

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 73-296

UNITED STATES OF AMERICA, *Plaintiff*,

v.

W. T. GRANT COMPANY; S. H. KRESS & COMPANY, and JOHN M. HANCOCK, *Defendants*.

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Civ. 73-298

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v.

THE KORGER COMPANY, JEWELL TEA COMPANY, INC.; and JOHN M. HANCOCK, *Defendants*.

(Filed Aug. 11, 1952, 4:15 P.M., U. S. District Court, S. D. of N. Y.)

CONGER, *J*.

MEMORANDUM

These are motions by the defendants to dismiss the complaints upon various grounds only one of

which I feel it necessary to consider. That ground is that the controversy in each case is moot.

Since this defect, so-called, does not appear on the face of the complaints, the defendants have had to disclose it by affidavit. In this light it is incumbent on the Court to treat it as one for summary judgment. See Rule 12(b) F.R.C.P.

The facts in each case are essentially the same save for the parties.

Section 8 of the Clayton Act in pertinent part provides:

> "* * * no person at the time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws * * *." 15 U.S.C. § 19.

Shortly after the filing of the complaints, and prior to March 15, 1952, Hancock failed to stand for re-election as a director of The Kroger Company and resigned his directorships in S. H. Kress & Company and Bond Stores, Inc. He, therefore, is no longer a director in competing companies.

In this setting the defendants say the controversies are moot and ask dismissal. The plaintiff resists, principally, I assume, because the Government would like to have some law on the subject of which there is a sparsity.

Hancock has known of the Government's objections for the last five years or so and he has been discussing it from time to time with the Government. But there is no showing of direct knowledge on the part of the corporations.

Despite the fact that Hancock's removal from these directorships has apparently remedied all the grievances the Government had, counsel insists that it is entitled to a decree that the defendants have violated Section 8; to an injunction against the defendants violating the Act in the future anytime, anywhere, and to a direction, if the Court sees fit, that Hancock resign from all the competing corporations.

All the parties have cited many cases wherein injunctions were sought on the question of mootness. The Government stresses *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. There, however, the Supreme Court rejected the defense of mootness when it appeared highly probable and evident that violations would be resumed in the future. The defendants cite among others, *United States* v. *Aluminum Co. of America*, 148 F. (2d) 416, (C.A. 2, 1945) wherein Judge Learned Hand stated at page 448:

"* * * The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption; a 'case of controversy' may remain to be disposed of. There are plentiful authorities so holding. [Cases cited] To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated."

See also *Bus Employees* v. *Wisconsin Board*, 340 U. S. 416.

That statement of Judge Learned Hand expresses the rule as the cases treat it."

I do not think there is the slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already], and I am inclined to follow Judge Jones in *U. S. v. Mather, et al.* (N. D. Ohio), who dismissed a similar suit as moot on December 2, 1935 for the same reasons urged here. There was no written opinion by the Judge but his remarks are quoted in the Government's motion (dated February 11, 1936) to dismiss without prejudice after the prior dismissal. There appears to be no other precedent.

The suit is not continued a controversy merely because a decree of past violation is sought. See *Standard Oil Co.* v. *United States*, 283 U. S. 163; *Walling* v. *Lacy*, 51 F. Supp. 1002 (D. C. Colo., 1943).

In conclusion, I fail to see what right the plaintiff has to a direction that Hancock resign from all the companies.

I, therefore, believe the suit should be dismissed. Since the motion takes the form of summary judgment, it is not possible to resolve it by Judge Jones' method of dismissal without prejudice. However, this decision would not be a bar to a new suit in case possible violations arise in the future.

Motions granted.

Settle orders.

/s/ EDWARD A. CONGER,
United States District Judge

Dated:
AUGUST 11, 1952.